

1 UNITED STATES OF AMERICA  
2 NUCLEAR REGULATORY COMMISSION

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4 PUBLIC MEETING REGARDING  
5 NRC HEARING PROCESS  
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8 U.S. NRC

9 11555 Rockville Pike

10 Commission Hearing Room

11 Rockville, Maryland  
12

13 Wednesday, October 27, 1999  
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15 The above-entitled meeting commenced, pursuant to  
16 notice, at 8:40 a.m.  
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## P R O C E E D I N G S

[8:40 a.m.]

CAMERON: I'm glad to see that most people came back. I realize that people have schedules where they might have to leave early or leave at certain times today and before, I'd give you at least a suggestion of where I think we might want to go this morning.

We have a new participant with us. Why don't you introduce yourself to us?

LASHWAY: Good morning. My name is Dave Lashway. I'm here on behalf of the National Mining Association. Tony Thompson was unable to make it. Katie Sweeney, also from the National Mining Association, is probably going to join us at some point, as well.

CAMERON: Thanks a lot, Dave. Yesterday, we spent a lot of time discussing some overall perspectives on the hearing process, as well as the objectives of the hearing process, and I did do a rewrite of the objective, draft objective statement that we were looking at yesterday, and I would suggest that when we start off our discussion this morning, we spend a little time discussing that.

And we also began to identify some problems or concerns that people have with the existing hearing process and there's also a handout you have on that.

I tried to put them in an order that I thought would be most

And I guess I would suggest that we go first to a discussion of the objective statement and then start going through the problems and when we get to each of those problems, let's just have a full discussion on that in terms of whether people think that it's a problem, what the various facets of the problem are and what some potential solutions are, and we'll work through that way.

MURPHY: Does that presuppose that a proposed rule will be published?

CAMERON: No. If there is a proposed rule drafted, that would be a suggestion. And I can assure you that we're going to have a break at 10:00 today, and I won't say anything more than that, but at 10:00, we're going to take a break, and we'll try to finish up around 12:15 today. I just thank all of you for being here.

1           Before we go to the objectives statement, does anybody have  
2           anything that they want to add before we get started on  
3           objectives in terms of what we're going to do today?

4                           ZAMEK: I have a question.

5                           CAMERON: Sure. Go ahead.

6           ZAMEK: My question is whether you had input from the  
7                           Commissioners during the night.

8           CAMERON: At 3:30 this morning. No. On that point, I will ask  
9           Joe if he wants to add any -- Joe Gray if he wants to add  
10                           anything to this.

11                          MR. GRAY: Probably not.

12           CAMERON: But probably not. We were joined by some of the  
13           legal assistants from the Commission offices yesterday and we  
14           are going to raise the issue of concern from yesterday and Tony  
15           suggested that, for example, we get a clarification on the SRM.

16                          That issue will be raised informally with the Commission.

17                                  Joe, are you going to --

18                          MR. GRAY: With the Commission offices.

19                          CAMERON: With the Commission offices.

20           MR. GRAY: It probably will be tomorrow before I can get to  
21           them, but there will be a meeting at which I will indicate the  
22           concerns and what some of the views are with regard to the SRM  
23                                  and what it seems to portend.

24           CAMERON: And I am going to make, at the break, copies of the  
25           SRM. Most of you have it, but also I wanted to make a copy of

1 the voting record that is available, the individual Commission  
2 votes, and I'll bring that down after the break.

3 Jill, anything else on that?

4 ZAMEK: I just feel like we're working in the dark in terms of  
5 what they're looking for from us. So I was hoping for some  
6 clarification on that.

7 CAMERON: I think that the material that is being developed and  
8 conversation around the table is going to be, from the  
9 indications I've had from the Commission legal assistants, that  
10 the information is going to be very helpful for their  
11 deliberations.

12 Okay. Let's introduce -- is this Katie?

13 SWEENEY: Yes. I'm sorry, I'm losing my voice.

14 CAMERON: And you haven't even begun the discussion.

15 SWEENEY: That's why Dave had to be here with me. Katie  
16 Sweeney, National Mining Association.

17 CAMERON: Thanks, Katie. Let's go to the handout, the redraft,  
18 so to speak, of the objective in the NRC hearing process. Just  
19 to -- before we discuss it, just to tell you what this means,  
20 if it's confusing, is if you look at -- the objective of the  
21 NRC hearing process is to provide a fair, and then there is an  
22 addition, and meaningful opportunity for interested members of  
23 the public.

24 There is a substitution for interested members of the public,  
25 substitute any person whose interest may be affected by the

1 proceeding, and that's the language from the statute.

2 And then we go to Ray's and we have an addition there, and

3 effectively pursue well defined issues that are within the

4 scope of review and for the NRC to efficiently, and there is an

5 addition, objectively and independently reach legally and

6 technically supportable, was the original, and there is a

7 substitute there, sound substantive conclusions.

8 For those of you who were here yesterday, I think you recognize

9 the discussion behind all of those particular points.

10 What isn't reflected here is we did have a discussion on what's

11 the purpose of the hearing process. Resolve disputes was

12 suggested, educate the public, inform the staff, and we also

13 had some discussions around public confidence, public

14 acceptance, and also public perception.

15 So let's go to the first phrase, to provide a fair and

16 meaningful, et cetera, et cetera, opportunity. Does anybody

17 have any comments on that? Bob?

18 BACKUS: First of all --

19 CAMERON: And speak into the mic, Bob, for everybody in the

20 back.

21 BACKUS: We all get trained on this. I do think there could be

22 confusion between objective and purpose and I -- before we even

23 get to the first phrase, I would rather describe this as just

24 saying the NRC hearing process should, because I think we did

25 discuss purposes and these are really not the purposes.

1           The purposes were dispute resolution and, at least for some of  
2                           us, additional purposes, such as meaningful public  
3   participation and so forth.

4           So I would not want to ever use this, think that we have  
5                           defined this as the purpose, and I think there could be  
6           confusion when you say objective as being the same as purpose.

7           CAMERON: Well, you can get wrapped up in the ambiguities, the  
8                           differences between objectives, purposes, outcomes.

9           Anybody have any problem with Bob's suggestion? Ellen?

10          GINSBERG: This is just a suggestion, but I was thinking that  
11          one of the things we talked about yesterday and there seemed to  
12                       be some agreement around the table is that a very important  
13                       aspect of this is to reach a sound, legally sound and  
14                       technically sound decision, and I wonder, if we flipped it, if  
15                       it might be clearer by saying that the NRC hearing process  
16                       should, and I'm not providing the exact words, but the concept  
17                       would be should generate a sound record on which a legally and  
18          technically sound decision can be made through providing a fair  
19   and yada yada yada.

20                           That sort of change in emphasis.

21                       CAMERON: And yada yada yada, that's --

22                       GINSBERG: That's the first part of that.

23           CAMERON: I'm sorry. I just was checking on the spelling of  
24          that. Let me just check in and see if anybody has any problems  
25                       with Bob's suggestion, which is to get out of the definitional

1                   quagmire by just saying the NRC hearing process should.

2                   Okay. Now, Ellen, your suggestion is to start off basically  
3                   with the generating the record, so that -- in other words, take  
4                   the last phrase about efficiently, objectively, independently  
5                   arriving at a sound decision and start off with that.

6                   GINSBERG: Yes. Whatever words we use, and I'm not necessarily  
7                   wedded to these as opposed to some of the other words we  
8                   bandied about yesterday, but to provide the initial concept as  
9                   being that this is to get to the right decision, to use Tony's  
10                   words.

11                   I think that if you start off that way and then you say -- and  
12                   you're going to provide the first part, which is a fair and  
13                   meaningful opportunity for interested persons to participate, I  
14                   think that that might really more crisply cover the purpose.

15                   CAMERON: Fine. Anybody have any problem with essentially  
16                   putting that, reorienting the emphasis here? Tony?

17                   ROISMAN: Only in this sense. I think that the first part of  
18                   that phrase, which is fine if it's at the end of the statement,  
19                   shouldn't be at the beginning of the statement, the NRC to  
20                   efficiently or, for that matter, objectively and independently.

21                   I think that emphasizes the wrong thing.

22                   If I understand Ellen's suggestion, she wants to start, and I  
23                   don't have any problem with that, with the idea of getting to  
24                   the right result is the first important thing.

25                   So I would put, if we go with Bob's idea, the purpose of the



CAMERON: Okay. Go ahead, Tony.

ROISMAN: I'm sorry. All I wanted to say is I don't know how much time you want to spend on playing with words. I don't like this word sound, because --

1 CAMERON: I think that's an important word probably to talk  
2 about. We'll spend a little bit of time on that.

3 ROISMAN: I just want us to blow past that.

4 CAMERON: And I just want to make sure that I understand,  
5 before we go to Larry's, what Ellen's point was.

6 Is there something that needs to be added in here or is it in  
7 here already?

8 GINSBERG: All I was suggesting is the concept of generating a  
9 record is not in the current paper in front of us and yesterday  
10 it was made, I think Joe made the suggestion and I was just  
11 posing it as a possible additional concept to be included in  
12 this.

13 CAMERON: Generating a certain type of record. Do you want to  
14 put some modifiers on that? Is that what I heard you say, too?

15 GINSBERG: I think I'll just make this comment and then we can  
16 go by it. The idea was to generate a record on which a  
17 technically and legally sound decision could be made, and I  
18 though that covered a lot of interests.

19 CAMERON: Okay. Great.

20 GINSBERG: That's why I was suggesting it.

21 CAMERON: All right. I got that. Larry?

22 CHANDLER: My variation on the theme is sort of what started  
23 the preamble, taking some of Bob's thoughts into mind, start  
24 off by saying in order to develop an adequate record upon which  
25 a legally and technically sound decision can be reached, the

1 NRC hearing process should provide, and then go through the  
2 other, start off with that, capture, I think, some of what  
3 Ellen was just discussing.

4 CAMERON: Do you want to repeat that? Ellen looks --

5 GINSBERG: Puzzled.

6 CAMERON: -- like she didn't --

7 CHANDLER: I would start off the whole concept by saying in  
8 order to develop an adequate record upon which a legally and  
9 technically sound decision can be reached, be made, the NRC  
10 hearing process should, then you capture the remaining words,  
11 provide a fair, and et cetera, et cetera.

12 CAMERON: Jeff is reaching for his card.

13 LUBBERS: Just a phrase. How about legally and scientifically  
14 correct decisions?

15 CAMERON: Tony, does that help you in terms of the sound?

16 ROISMAN: Yes. That's better, I think that's a lot better than  
17 sound. It doesn't leave any ambiguity about what this is  
18 supposed to be.

19 CHANDLER: I'm sorry. Which word?

20 CAMERON: Legally and scientifically correct.

21 CHANDLER: I'm not sure scientifically could work.

22 CAMERON: Speak into the mic, please, Larry.

23 CHANDLER: I just thought scientifically -- we talked about  
24 good science yesterday and technical could have a -- scientists  
25 and the engineers tend to --

1 CAMERON: Right. Is that indeed -- we're on the science versus  
2 engineering question here, a Paul points out.

3 CHANDLER: There are lots of folks who wouldn't necessarily  
4 consider themselves to be scientists.

5 CAMERON: And that technical is a better word.

6 CHANDLER: Technical I tend to think of in a broader way.

7 CAMERON: Let me just check in with Tony here. Substituting  
8 the word correct for sound.

9 ROISMAN: I think I would agree with that.

10 CAMERON: Better?

11 ROISMAN: But I'm not sure I agree with Larry's -- I think  
12 technical -- it's different than scientific and I agree there  
13 is this dispute between scientists and engineers, but it seems  
14 to me that, if necessary, if that really is -- if there is some  
15 history to it, that maybe both phrases should be there, because  
16 if it's technically correct and scientifically wrong, it  
17 wouldn't be the decision the Commission wants to reach, and,  
18 conversely, if it's scientifically correct and technically  
19 wrong, it wouldn't be what the Commission wants to reach  
20 either.

21 So if there really is some substantive difference between those  
22 two words, then I think maybe they both have to be there.

23 CAMERON: Let's go to Larry, and speak into the mic, Larry, and  
24 then we'll go to Ellen.

25 CHANDLER: The distinction I'm trying to create, and we could

1           be spending more time than needed on this, but the distinction  
2           I'm trying to recognize is there are many issues which are not  
3                           what I would think of as scientific issues.

4           In the license transfer area, for example, there are numerous  
5                           issues related to corporate relationships, control over  
6           corporate entities, which tend to be more of an economic or  
7           business nature, that I wouldn't necessarily consider to be  
8                           scientific issues.

9           They may be issues of foreign control, which I wouldn't  
10          consider to be scientific issues. So the term I'm looking for,  
11          and I don't know if technical is the better one, is something  
12                           that would -- it captures the substantive.

13          Now, maybe the word -- substituting the word substantive for  
14          technically, just say legally and substantively, and my  
15                           preference would be the word sound decision.

16          CAMERON: So I'll do a reprise on this in a minute on what  
17          these variations are. Let's hear from Ellen, and then Susan,  
18                           and then see where we are. Ellen?

19          GINSBERG: Thanks. With respect to sound versus correct, I  
20          have a nagging concern about correct, because correct implies  
21          or at least I infer, when you hear the word correct, that there  
22          is only one answer and when you have a plaintiff and you have a  
23          defendant in any civil case, my guess is that the losing party  
24                           views it as an incorrect decision.

25          And I really worry about, in this context, using the word

1           correct as opposed to sound or supportable. And, again, I'm  
2           not wedded to either of those words, but something that  
3 captures the concept that there are certain issues where we may  
4           not agree on correctness of the decision.

5           I don't know, I don't have at my fingertips a word to  
6 substitute for it that might satisfy everybody, but I do want  
7           to express a concern about the word correct.

8           CAMERON: Okay. Thank you. Susan?

9           HIATT: I want to address some of what I think are appropriate  
10          qualifiers for generating a blank record. You might fill in  
11          that blank with a full record, a complete record, and a  
12          balanced record.

13          CAMERON: So you would have full and balanced as a substitute  
14          for adequate or --

15          HIATT: Yes. I would prefer substituting that for adequate.

16          CAMERON: Let me just try to sum this up for people. Again, I  
17 think it's worthwhile to try to work on this, but I don't think  
18          that we need to kill ourselves over it either.

19          I think we have three issues up here. We started out with  
20          supportable. We've gone to sound. Is sound better than  
21          correct? Is there another word to use there? Second issue,  
22          this technically, scientifically, versus substantive, the use  
23 of the word substantive, which covers -- which would cover any  
24          of the types of issues in any hearing that could come up, I  
25          think is Larry's point.

1 And Susan's point that it should be a full and balanced record,  
2 as opposed to an adequate record.

3 Tony, did you want to say something now? Then we'll go to Jay.

4 ROISMAN; I think Ellen's point put her finger on an important  
5 issue, if you will, and probably, I mean, the real answer to  
6 this would be a -- if we came up with something like this, what  
7 would happen to it.

8 If the Commissioners adopted it and put it into the preamble to  
9 something or whatever, what language would be used by general  
10 counsel in that statement to describe what it means.

11 Ellen and I, I think, have a somewhat different view of what we  
12 think the role of those words, correct versus sound, are  
13 supposed to mean.

14 My idea is that what it's supposed to mean is that the  
15 Commission has, as its goal, getting correct answers and that  
16 there are correct answers and the fact that there is a losing  
17 party doesn't mean that just because they still believe they  
18 were correct, their answer is correct.

19 Ellen's point is to emphasize the process part of it, which is  
20 that we're trying to have a process which will produce, among  
21 possibly correct answers, the one that the Commission has  
22 chosen that will stand up legally in court and stand up in  
23 other ways.

24 I think that's a not insignificant difference. I really  
25 intended yesterday, when I suggested that we not use





1 very specific and correct answer there. There are a whole host  
2 of issues that may not lend themselves to that kind of  
3 quantifiable or specific response.

4 I think correct is misleading in terms of the objective.  
5 The other thing is, yesterday, there was a comment made about  
6 or several comments made about zero risk. The court has  
7 already talked about zero risk. We can't impose now, unless  
8 the Commission decides to go in this direction, a zero risk  
9 standard where the court has said that's not what adequate  
10 protection means. That's not the definition in the Atomic  
11 Energy Act and in the NRC regulations.

12 I think that plays into this. I just wanted to make that  
13 point, because I didn't have a chance to do it yesterday.

14 CAMERON: Let's hear from Alan before we go over to Jay. I  
15 don't think that Tony was suggesting that the word sound or the  
16 word correct would mean zero risk, but I'll --

17 ROISMAN: That's correct.

18 CAMERON: All right. Alan?

19 HEIFETZ: I found Larry's formulation to be one that was very  
20 understandable to me and clear. I'm concerned about this word  
21 correct because I don't think it falls within my understanding  
22 of what scientific method is.

23 There isn't any correct scientific method. There's a theory  
24 that is acceptable and it stays acceptable until you can  
25 demonstrate that it's no longer acceptable, but there may be a





CAMERON: So perhaps the concern there might more fully  
addressed by what fair includes, and that's your concern.

CAMERON: We're going to get to that substantive issue today.

EDGAR: I'd favor, if we're going to draw some distinction between a process-based purpose or objective and a result-based objective, I really have trouble with the notion that the adjudicatory process is one that creates precise results.

It never has. It's always been a way of approximating an answer. We have a system where we'll generate a record, we will have a set of standards for a decision, which are really not precise standards, reasonable assurance, adequate safety, and in the end, a court is going to look at this record and say

was it supported by substantial evidence.

1 I think we're trying to impose and freight too much in the  
2 process by a statement that would use a term like correct. I  
3 think it's a little too absolute and it doesn't reflect the  
4 realities of the existing process.

5 CAMERON: Thank you. And you're weighing in on obviously the  
6 side of not using the term correct.

7 EDGAR: Look at how this process has been invented. Why are  
8 you trying to rewrite the standard?

9 CAMERON: I think -- and Tony, correct me if I'm wrong on this,  
10 but your point is that the decision should be one that fulfills  
11 the Commission's mandate to protect public health and safety,  
12 because.

13 ROISMAN: Right.

14 CAMERON: I mean, that's the underlying concern.

15 ROISMAN: That's right. To say correct doesn't mean a correct  
16 or the correct. It just means correct. That's number one.  
17 Number two, it doesn't attempt to change the standard. If it's  
18 adequate for the Commission to license a plant, if there is  
19 reasonable assurance, then all this mean is that its decision  
20 that there is reasonable assurance is correct and not -- so  
21 there is no intent to use the phrase to try to bootstrap some  
22 new standard, but to simply say what the standard is, the  
23 Commission's decision on that standard, they should have -- I  
24 mean, it almost, it seems to me, that it's a little surprising  
25 anybody would argue with it, although I'm often surprised that

1 people argue with positions that I take.

2 This one seems to be more worthy of being embraced than most.

3 It's that they want to make correct decisions and sound is just  
4 kind of -- I don't know -- it's just kind of mealy-mouth word.

5 Correct is pretty clear. It means, yeah, we are right.

6 Now, some court might tell them, no, you're wrong, and events

7 might prove them wrong, but the goal is we want to have a

8 correct decision and to take away any suggestion that the

9 decision is okay as long as we had a good process and the fact

10 that it's correct or not doesn't matter would be really a bad

11 thing.

12 CAMERON: Mike, you, I think, wanted to amplify on what Tony

13 just said, right?

14 MCGARRY: I do. I think Tony's comments have clarified a

15 statement I was going to make before, because it seemed like,

16 as George pointed out, we're moving into a direction of maybe

17 creating a new standard for judicial review. But as Ellen

18 said, we all want the right decision.

19 So if this statement somehow is going to work its way into a

20 statement of considerations, if there is a rule, I wouldn't

21 object to the word correct as long as it is defined as you have

22 laid it out, Tony.

23 I think George's position should be recognized in a statement

24 of considerations that the Commission is not about establishing

25 a new standard for judicial review, that this test of

1           substantial evidence is to support the decision, but it is the  
2           objective of the Commission to reach the correct and right  
3           decision in this context.

4       CAMERON: Okay. We're just going to take the cards that are up  
5       and then we're going to move on. Let's go -- is it going to be  
6           Dave or is it Katie? Dave, all right.

7           LASHWAY: Not beating a dead horse, but there is a lot of  
8           baggage, I think we would agree with you on that point, but  
9           there is a lot of baggage with the word sound. At PA, for  
10          example, sound science is being debated thoroughly in the GMO  
11          context and let's be sure that if we don't want to amend or  
12          alter the judicial standard here, sound science may not be the  
13               term we want to choose.

14       CAMERON: Thank you. That's useful for us to look at.

15       Jim, and then let's go to Larry for last comment. Jim?

16       RICCIO: After listening to Ellen, I understand why the  
17       industry wants to move towards risk-based regulation. There is  
18           a standard and the standard should be met. We had a  
19       deterministic standard for regulation within the industry, and  
20       I just wanted to point out the irony that we're 45 years into  
21       the process and we're deciding what constitutes a legitimate  
22   hearing.

23       This reminds me of the meeting we had a couple weeks ago where  
24           the agency and the industry are sitting around trying to  
25       determine what is the design basis. You guys are 45 years into





1           addition of the word complete into the process and I have a  
2           concern about that, and especially with that word in the  
3           context of some comments that Tony then made.

4           The completeness of the -- the hearing process is just that.  
5           It is a process. It provides a forum by which the participants  
6           have an opportunity to raise issues and have those issues  
7           adjudicated. We talked about that yesterday and I think George  
8           had raised a concern about what the objective is; is it dispute  
9           resolution or something else.

10          The completeness of the record is a function of what the  
11          parties offer, but also it's something that may be controlled  
12          by the tribunal, by the presiding officer, by the board,  
13          whoever is presiding in a given case.

14          In other words, a party may have what it believes to be more  
15          evidence to offer and that evidence may be excluded by the  
16          tribunal because it may be cumulative or for lots of reasons.

17          So the term completeness could imply some subjective notion  
18          that I don't think the Commission may want to subscribe to. It  
19          certainly needs to be an adequate record, it needs to be a  
20          substantial record, in order to support a decision that's made.

21          I was a proponent of the word sound, I still believe it's a  
22          good one in the context, but I'm concerned about introducing a  
23          notion that we're changing -- as I said yesterday, changing  
24          standards here when we describe what really is a process by  
25          which substantive decisions get made.

1 CAMERON: Thank you, Larry. What I'd like to do now is to move  
2 on to our list of issues and we had a lot of discussion of  
3 these issues yesterday, including some proposed solutions.  
4 What I'd like to do is to move through these issue by issue,  
5 and including whether you agree that there is a problem, what  
6 are the aspects of the problem, what are some potential  
7 solutions.

8 I put the generic issue on first. We had a lot of discussion  
9 of that yesterday and the feeling was while people understand  
10 perhaps that there is a long tradition of trying to address  
11 issues through generic means rather than case specific means,  
12 but there have been some circumstances where there seems to be  
13 perception, an element of unfairness associated with using  
14 generic mechanisms to take issues off the table.  
15 And if we could put a finder point on what circumstances people  
16 think are inappropriate for that use, then I think that would  
17 be very, very helpful.

18 I'm going to start with Jeff Lubbers on this one and then go to  
19 the rest of the folk. Go ahead, Jeff.

20 LUBBERS: If I could make a generic point about this. I think  
21 that it's usually beneficial for agencies to make policy  
22 through rulemaking, if they can, and I think one of the  
23 problems with the administrative process now is that rulemaking  
24 itself has become more difficult.

25 But we have many situations where agencies want to sort of

1 settle issues that come up in a case by case context. OSHA has  
2 been trying to do an ergonomics rule for years and it's kind of  
3 been thwarted by Congressional appropriations, riders, and  
4 things like that.

5 The National Labor Relations Board, which decides cases case by  
6 case has been urged repeatedly to do more rulemaking rather  
7 than just wait for cases to come up.

8 So I think as a general matter, deciding issues through generic  
9 means -- and really, I don't know what we're talking about  
10 except rulemaking there -- is a good thing.

11 Tony Roisman raised a few issues with respect to how this is  
12 done that I just want to comment on. I think that it can be a  
13 problem if an agency that does a lot of adjudicatory  
14 policy-making starts -- decides that, well, here is an issue  
15 that's coming up frequently, let's try to do a rule on it.

16 Meanwhile, there are cases in the pipeline where the issue is  
17 coming up.

18 I think there, and we talked about this in one of our studies  
19 at the Administrative Conference relating to the NLRB, we just  
20 said that the NLRB should continue to decide those cases based  
21 on prior precedent while they're doing the rulemaking.

22 If it's an issue of first impression, and this is what I  
23 gathered Tony's main concern was, where some issue has come up  
24 in a licensing proceeding and the intervenors are sort of  
25 making hay with this and all of a sudden the Commission



1           So I think there are some things that the NRC could think about  
2           doing in improving the rulemaking process, but I think the real  
3           only problem I see is the specific problem of plucking an issue  
4                   out of a -- a first impression out of a licensing case and  
5           saying, oh, we're not going to handle that in licensing, we're  
6                   only going to handle that in rulemaking.

7           CAMERON: Thanks for those suggestions. You mentioned a couple  
8           of things that I think might sort of zero in on in this problem.

9                   One is the timing issue, the timing of when the generic  
10           resolution is done, and, also, perhaps the type of issue. I  
11           don't know if there's anything associated -- there are certain  
12                   types of issues.

13           You mentioned this novel new type of thing. I don't know if  
14           that -- if there's a type of issue criterion that might be used  
15                   here and I think Jill is going to give us some examples,  
16                   perhaps.

17                   But just as a point of clarification, we have done two  
18           negotiated rulemakings. One of them was required, on  
19           radiopharmaceuticals, but the other one was the one that Mal  
20           Murphy mentioned yesterday that came up with some new rules for  
21           the high level waste proceeding on this hearing process issue.

22                   Jill?

23                   ZAMEK: Some of the issues that have been labeled generic  
24           really have some site-specific exceptions. Diablo is one that  
25           I work on and when we came -- we did a license recapture, is

1           what we did, and we weren't allowed to talk about the waste,  
2           but the -- it's sitting on an earthquake fault, for one thing,  
3           and the pools are going to be filled by the year 2006 and they  
4           gave them the license till the year 2023 and 25.

5           It seemed like we should be able to speak to what's going to  
6           happen to this waste and the earthquake fault and all that kind  
7           of stuff. It's not generic when it's site-specific.

8           CAMERON: But do you -- I guess the question would be, do you  
9           feel that you can't raise the issues that you want to raise  
10          effectively by commenting on the proposed generic solution to a  
11          particular issue that might apply on a site-specific basis.

12          ZAMEK: One of the problems is the time, talk about delay.  
13          This hearing was, you know, I don't know, five years ago and I  
14          never got to speak up about this and I doubt that I ever will.

15          And there's no resolution. The same thing happened with the  
16          Thermolag stuff. You're only allowed to talk about that in a  
17          small context and it doesn't get resolved for many, many years  
18          and we don't have any input in that.

19          CAMERON: We're going to go to Larry now. Larry, besides -- in  
20          addition to the point you were making, if you have anything to  
21          offer in terms of what Jill just said, please do so.

22          CHANDLER: Actually, I was not going to make a point as much as  
23          ask for clarification and I think it was of Jill, who had made  
24          reference, and you've captured it in the words generic EIS.  
25          I just don't understand what the context was in which those

1 words were used yesterday, because I can understand having  
2 issues foreclosed, perhaps, because of generic resolution or  
3 treatment in a rule and we discussed very briefly yesterday the  
4 fact that they can be challenged in certain circumstances.  
5 But simply the existence of a generic environmental statement,  
6 I'm not sure why that would have foreclosed consideration of an  
7 issue, unless that's somehow captured in a rule.

8 CAMERON: Now, Jim, it may be -- I'm not sure if Jill was the  
9 one who mentioned that yesterday, but Jim had an example.

10 RICCIO: I think I may have raised it yesterday. Basically, if  
11 you look at license renewal, the industry has mentioned there  
12 are at least 22 plants that have now moved forward and said  
13 they want to do license renewal.

14 Many of the generic issues that touch upon license renewal were  
15 foreclosed long before the public had any idea which of these  
16 plants were going to be renewed. So there is no reason for the  
17 public to get involved, because they didn't know whether or not  
18 there was an eminent threat of the reactor being relicensed.  
19 So just by basically foreclosing issues early in the process,  
20 prior to the public even having notification --

21 LUBBERS: What sort of issue?

22 CHANDLER: Let me help. When the license renewal rulemaking  
23 was undertaken, our Part 51, which are environmental rules,  
24 dealt with environmental issues associated with renewal through  
25 a generic process. But this is not just simply a freestanding

1 generic environmental impact statement. There was a rulemaking  
2 associated with it.

3 There were -- I forget what the total number was, 88, 90, some  
4 issues that were identified as being pertinent to renewal,  
5 environmental issues.

6 Of those, some 60 were determined to be and were captured in  
7 the rule as being generically determined, cannot be raised.

8 Some others were question marks and others were left open for  
9 case by case resolution.

10 So there was specific treatment in the rule. It's not, as I  
11 say, just a freestanding environmental statement, but, in fact,  
12 the way in which the rule itself is written.

13 LUBBERS: Was the rule challenged in court?>

14 CHANDLER: No, not on this aspect. No.

15 RICCIO: Not the second rewrite of it.

16 CAMERON: All right. Let's -- thanks for that clarification.

17 I mean, the conclusion of the environmental statement is, I  
18 think, what Larry is saying were institutionalized in a  
19 rulemaking.

20 CHANDLER: A rulemaking in which there was notice and comment.

21 RICCIO: Of course, there was notice and comment, but the point  
22 is if the public has no idea that it's going to affect their  
23 interests, why are they going to participate? It's a way to  
24 foreclose public involvement at an early stage.

25 CAMERON: Can I put -- and we're going to go to Ellen, but



CAMERON: Thanks, Ellen. Tony, what do you have to say about  
all of this?

1 ROISMAN: Well, I think a couple of things. One, since it's  
2 not this group of Commissioners, although it may be some of the  
3 staff, I can talk openly about GESMO, because it's a good  
4 example for Jeff to understand what this problem is.

5 The Commission was proceeding ahead with certain kinds of  
6 individualized licensing decisions and the issue got raised as  
7 to whether or not there were environmental impacts associated  
8 with the use of plutonium as a fuel in nuclear reactors, and  
9 the most significant of those or the hottest one was did it  
10 make a terrorist risk much more palatable by creating something  
11 that terrorists could interfere with.

12 And we could certainly argue that there's a lot of  
13 site-specific things that are involved in that. If the site  
14 that you're going to have all the plutonium at and moved from  
15 and the site that it's going to be moved to are all in very  
16 remote areas, where it's relatively easy to do surveillance and  
17 watch out and protect, you have one set of risks, and if it's  
18 moving along the eastern seaboard, you have a different set of  
19 risks.

20 For whatever reasons, the Commission made the decision that  
21 that issue should be dealt with generically. And let's assume  
22 for the moment that that was a sound decision and a correct  
23 decision, and that there was nothing wrong with that decision.

24 But what the Commission did was it said we're going to take  
25 that issue away from individual licensing proceedings and we're

1           going to move it into a generic context and while we are  
2       deciding it, the individual licensing proceedings will continue  
3           and if they reach a conclusion before we're done, tough.  
4       That history makes people very nervous about the Commission  
5           using the generic process as a device to evade facing of  
6       questions. They did the same thing on what's called the S3  
7           rule, which deals with the nuclear waste disposal.  
8       The Commission didn't, doesn't and, as far as I know, has no  
9       intent to ever honestly answer the question does it make any  
10      sense to allow new nuclear waste to be generated when we do not  
11      have in place a solution to the problem of disposing of it.  
12      What they said in the S3 rule, which is the still rule that  
13      applies in every case, is because we will have to have a  
14      solution, we are going to assume we will have a solution.  
15      Now, with all due respect, I just think that's garbage and it's  
16      political garbage. It's not even substantive garbage. But  
17              that's what they have done.  
18      So there is this history of people being concerned that the  
19      Commission is deliberately playing games with this generic  
20      rulemaking process as a way of taking all the hard issues away  
21      from individual licensing proceedings and keeping the train  
22              running on time.  
23      Having said that, and I don't know that there is a solution for  
24      that if you can't convince a court, we did in GESMO, we did not  
25      in S3, that what the Commission did was wrong and that may be

1 the only remedy to that. But there is at least the second part  
2 of it, which I think you addressed and I think it raised some  
3 important points.

4 That is, should there be some kind of restriction on the use of  
5 generic rulemaking as a device for taking issues out of  
6 individual licensing proceedings when the issue had already  
7 started in the individual licensing proceeding and the generic  
8 rulemaking comes after the fact.

9 So as the Commission always wants to do when it sets new safety  
10 standards, it ought to be considered, if not adopted as a rule,  
11 that if you're going to do generic rulemaking, you grandfather  
12 every case in which the issue has already been raised and let  
13 that go to conclusion in the individual case.

14 If the generic rulemaking is completed before that case is  
15 completed, then you might put in place a process by which you  
16 blend the generic rulemaking with the individual action, but  
17 there ought to be -- I think Larry mentioned there is a fairly  
18 high standard for interfering with the decision made in the  
19 generic rulemaking in an individual case, if you meet a high  
20 standard.

21 I would say if you've got a case that's already ongoing and a  
22 generic rulemaking concludes, the high standard is  
23 automatically deemed met and the licensing board considers  
24 equally the resolution of the matter in the generic process,  
25 informed by whatever additional evidence got developed in the

1 individual case.

2 At least if you grandfather, I think it takes care of some of  
3 the concern that the process is being used to avoid the tough  
4 questions.

5 Ultimately, on some of them, the Commission can follow what I  
6 think would be a procedurally acceptable approach and then it's  
7 just a matter of a legal dispute that you have to take to  
8 court; could they legally take this issue away from individual  
9 cases that are decided in this way.

10 That's what I think is kind of the history of it.

11 CAMERON: Thank you, Tony. It does -- you have put one  
12 suggestion for how to deal with perhaps what people view as the  
13 most egregious use of this mechanism.

14 I really want to make sure that we start on another issue  
15 before 10:00. So what I would suggest is we take the cards  
16 that are up and if the people who do have their cards up, I'd  
17 like to hear some comment, and particularly from Larry and Joe  
18 perhaps, on Tony's suggestion on the feasibility of that, if  
19 you want to say anything.

20 Let's go to Jay, and then Bob, and then over to George. Jay?

21 SILBERG: First, on Jim's point that putting issues into the  
22 generic hopper, somehow this affects individuals because they  
23 don't know that their particular neighborhood plant will be  
24 affected, I think would cut the legs out from under the whole  
25 generic process.

1           By definition, any issue that's going to be dealt with on a  
2 nationwide basis generically is going to affect everyone and if  
3 somehow we exclude people whose neighborhoods or neighborhood  
4 plant or neighborhood licensed activity is not yet known to be  
5 in the group that's going to be affected, you do weigh what the  
6 whole possibility of generic solutions.

7           If we have a situation, if we have a scheme which allows for  
8 generic treatment, by definition, some people will not know  
9 that it will apply to them, because generic solutions tend to  
10 last for long periods of time. There may be people yet unborn,  
11 there may be nuclear plants or activities yet unborn who will  
12 be affected by generic solutions, and if you adopt the view  
13 that somehow you can't apply those generic solutions in  
14 individual cases because those individuals didn't know that  
15 they were going to be directly affected, you might as well get  
16 rid of generic solutions completely.

17           I think you can make the same comment about national  
18 legislation. Any national legislation that establishes  
19 standards that are going to govern everyone is subject to the  
20 same argument and either we have nationwide or generic  
21 solutions or we don't, and I think the benefits of having them  
22 far outweigh the detriments.

23           There are going to be people on both sides who may not know  
24 they're affected. There may be people who will be applicants  
25 who don't know they're applicants at the time a generic rule is

In terms of Tony's comment on grandfathering individual cases where an issue is raised, I think the law is pretty clear on that and I think it goes back as far as Ecology Action, 2nd Circuit decision in 1972, in the NRC arena.

I'm not sure how Tony would react if an individual case were grandfathered and it turned out that the resolution in that case were significantly more beneficial to the applicant than the generic solution. I doubt Tony would let the applicant get away with having, if you will, a less restrictive rule applied to it because it happened to prevail that way in a site-specific case, and it can't be a one-way street.

If a generic determination is safe, meets the reasonable assurance standard or meets the NEPA standard, then that ought to be good enough for everybody, whether it was started in the generic proceeding or not, and there are lots of reasons why you start -- issues come up in generic proceedings that may be, as it was in the case of some of the spent fuel storage casks,

We disagree with a lot of decisions the Commission makes in rulemaking.



1                   But there was a rule, there was a process, and nobody  
2                   challenged the result in court. If people are unhappy, there  
3                   is a forum to go to and there are lots of reasons why people  
4                   choose not to appeal various decisions in court.  
5                   But that is where it ought to be fought and I think to say now  
6                   that the decision was garbage, when those who now say it was  
7                   garbage chose not to appeal it, I think, is after the fact and  
8                   sour grapes.

9                   CAMERON: Thank you. I guess let's go to Bob and then George  
10                  and then finish off on this. I'm sorry that I need to do that.

11                 RICCIO: I'm not going to let -- the generic process that you  
12                 talk about with the dry casks now has given us basically  
13                 exploding casks on the shores of Lake Michigan. So if that's a  
14                 proper process and it is a good outcome, you have hydrogen  
15                 bursts occurring in dry casks that came out of that generic  
16                 process.

17                 So if that's a proper process and it reaches a sound  
18                 conclusion, I think we're all in trouble.

19                 CAMERON: Let's go to Bob. Bob Backus.

20                 BACKUS: I think the logic for generic treatment of certain  
21                 issues is unassailable. Nuclear waste in Diablo is the same as  
22                 nuclear waste in Seabrook and so forth and generic treatment of  
23                 that, though we may not like it, it's awfully hard to argue  
24                 against it.

25                 But this whole discussion shows that we need -- when we're



1 doesn't have any pictures in it, for gosh sakes. And create an  
2 extraordinary -- I think you have to go beyond the ordinary,  
3 because after all, this is a unique agency, it's dealing with a  
4 unique technology, with unique risks.  
5 And if they want to have, as the industry clearly does, many of  
6 these issues handled generically, you've got to go the extra  
7 mile or three miles to create a process -- or nine miles -- 26  
8 miles, we'll make it a marathon -- and create a process that  
9 really seeks out the intervention on this.

10 CAMERON: Thanks, Bob. I think that that point is noted and  
11 the Commission is trying to go that extra mile in the  
12 rulemaking area, too, and certainly there can be improvements  
13 to that. But I think that the underlying philosophy that we're  
14 talking about for hearing process also applies to other types  
15 of regulatory interactions.

16 Final point to George.

17 EDGAR: I would really -- I have a real problem with the notion  
18 that the agency's hands should be tied, their discretion should  
19 be constrained in terms of their ability to take issues from  
20 individual cases and put them in a generic process.

21 That's precisely why the agency has that discretion. The  
22 Supreme Court has upheld that discretion. The classic case is  
23 ECCS. You have it being raised in nine individual cases. You  
24 consolidate it, you put it into one proceeding, and you resolve  
25 it.

If, for some reason, the rule wouldn't serve the purpose for which it was adopted, then one can seek relief under the waiver doctrine.

CAMERON: Okay. Thanks, George. Before we take a break, I at least want to start on a major issue and it is the third issue down, which is proceedings. We heard yesterday proceedings can be overly long and complicated, ascribed to at least one -- one underlying cause is that the boards do not exercise the control necessary over the case in terms of cross examination.

Let's start on this issue. I guess that in deference to a guest, I would just ask if Alan has anything to say in addition to what he said yesterday on this particular issue.

HEIFETZ: I think the only thing that I would suggest is if there are particular problems that you have with the process,

What I tried to do yesterday was just give you a brief idea of how you can go from one type of proceeding to another, collapse timeframes, engage in case management techniques, but I don't come away from the workshop so far understanding exactly what it is about the NRC process that makes things so slow.

But I can't do it without knowing exactly what is taking so long and I'm here to respond to anything that you have, but I don't have generic suggestions at this point.

But in response to what Alan -- the question he put to the group, does anybody have anything to say on that? Joe?

GRAY: I guess I would just reiterate your question. Twenty

1           years ago and up through the mid '90s, there were various  
2                           examples of protracted proceedings.  
3       More recently, to some extent, at the Commission's urging, the  
4           presiding officers, licensing boards, have utilized many  
5                           techniques to control proceedings.

6           I guess my question is what is the more -- what are the views  
7       on the more recent history with a lot of these techniques being  
8           used. Is the thought that there's still unnecessary delay and  
9           protracted proceedings, despite these controls? And if so,  
10       what additional control techniques would people suggest that  
11                           might address the problem.

12           CAMERON: Thanks for that articulation from the NRC  
13           infrastructure, so to speak, of what Alan was asking.  
14       Responses to Joe and Alan on this one? Let's go to Edgar, and  
15                           then over to Dave.

16           EDGAR: I think the recent history is positive, the policy  
17           statement, direction the Commission has given, the way it's  
18           been carried out by licensing boards, but most significantly,  
19       the continuing Commission oversight, the intrusive role of the  
20           Commission in managing or at least overseeing the process is  
21                           crucial.

22       I would suggest that the mechanisms for control of the hearing  
23           process are well understood within the Commission and by the  
24           licensing boards. Judge, you asked a question, what's  
25       different about the NRC, is there something different, and the

1 answer is yes.

2 As distinct from other agency proceedings, the degree of  
3 polarization in an NRC proceeding amongst the parties is  
4 generally higher than in most decision-making proceedings.

5 It tends to be a yes/no. That's not true in all cases. There  
6 are many cases in which we've participated in which the parties  
7 aren't that far apart. There are ways for cooperation or for  
8 people to adopt a common mission of getting through the  
9 proceeding.

10 But it's only fair to recognize that there is a high degree of  
11 polarization. I don't know whether you sensed it from some of  
12 the debate here.

13 That's not to say that's good or bad. That's the reality. I  
14 mean, that's what it is and it doesn't tend to create a process  
15 where you're going to get a predictable managed result.

16 CAMERON: I guess that's the -- what are the implications of  
17 polarization in terms of the need for more effective case  
18 management, is the question. Does that lead to more abuses or  
19 even, not terming it abuses, does that lead to more delay, et  
20 cetera, et cetera? Just a question to think about.

21 Dave, let's go to you and then over to Tony.

22 LASHWAY: Obviously, our experience lies primarily in the  
23 materials licensee context and I'm sure Tony Thompson, as he  
24 indicated to me last night, commented yesterday on the less  
25 risk involved with materials licensees.

1 But certainly the informal process that I've been a part of on  
2 behalf of various licensees, including Hydro Resources, has  
3 been a very interesting one from an administrative law context,  
4 in that while we certainly, as licensees, are happy about  
5 engaging in an informal process, an iterative process, and we  
6 welcome Commission oversight readily, the process, at least in  
7 the HRI context, as well as in the international uranium  
8 context and I can also say in the ATWS context, has been one  
9 that has been drawn out and has indeed lacked structure.  
10 The kind of a chart we put together the other day reflecting  
11 the HRI process shows that more than 70 briefs were filed over  
12 the course of a year in the HRI proceeding. Unlimited reply  
13 briefs were filed by the intervenors. Every decision of the  
14 presiding officer, both procedural and substantive, were  
15 appealed to the Commission and, in fact, were subsequently  
16 appealed to the DC Circuit Court of Appeals.  
17 We now, in the HRI proceeding, for example, have two cases  
18 pending in the DC Circuit. The DC Circuit recently issued an  
19 opinion dismissing one of the cases and has requested the  
20 intervenors to show cause why they shouldn't be sanctioned for  
21 abusing the process.  
22 This type of proceeding certainly does not fulfill the goals  
23 that we have kind of outlined or you have roughly sketched and  
24 we discussed earlier, nor any of the goals in the policy  
25 statements.





1 case by case basis and certainly, when you do so, please do not  
2 skip the uranium recovery industry, because I think some of the  
3 issues that we have confronted in our hearings can certainly be  
4 useful and enlightening in the broader context.

5 We also have had to deal with this generic decision-making  
6 issue with respect to not only the generic environmental impact  
7 statement that exists with respect to the uranium recovery  
8 industry and mill tailings, but also in the context of  
9 performance-based licensing.

10 The intervenors, for example, in the HRI proceeding have  
11 attempted to challenge directly the performance-based licensing  
12 approach by the agency in the agency proceeding, as well as now  
13 at the DC Circuit. That has raised a whole slew of issues,  
14 many of which we've begun to talk about here, but I certainly  
15 recommend that you take a look at these cases and I think it  
16 will become readily apparent after reading some of these  
17 decisions and the briefs of the parties, what the major issues  
18 are.

19 CAMERON: And I guess that based on what you said, that there's  
20 still some -- there's a question of what could the Commission  
21 -- what direction, in addition to the policy statement, could  
22 the Commission give to the licensing boards to exercise in  
23 their discretion to prevent or to mitigate some of the things  
24 that you're talking about?

25 We still haven't heard anything on that. Tony, do you want to

1 go ahead?

2 ROISMAN: If I heard that correctly, he seemed to be saying  
3 what, at least in part, what I was saying, which is we ought to  
4 study this, because nobody knows whether there's a problem.

5 CAMERON: You think that just reaffirms the need for study.

6 ROISMAN: I think it would be a huge mistake to make policy on  
7 the basis of anecdote. And with regard to the underlying  
8 premise of the uranium recovery people that they're are low  
9 risk, low consequences category, I would say the magnitude of  
10 resistance that you're getting to your licensing would suggest  
11 that you're wrong about that.

12 Somebody out there must think that you're either a high risk or  
13 a high probability problem or else you wouldn't have that kind  
14 of opposition to what you're doing.

15 So there's something going on. I mean, it's like a -- you  
16 know, when the canaries start dying in the coal mine, you begin  
17 to think there may be gas down there. In this case, you've got  
18 a number of people showing up with concerns.

19 But third, I think you seem to be suggesting that in the  
20 informal hearing process, which I gather is what you've had,  
21 that a licensing board chairman has felt that that process  
22 requires him to be more lenient in terms of how he exercises  
23 his discretion, which he has an enormous amount of, about  
24 allowing reply briefs or allowing additional briefing and so  
25 forth and so on.



1           contributes to these problems, what fixes would you come up  
2           with. I just wanted to say, in that regard, it goes back to  
3           Tony's point about doing an evaluation of these cases. I think  
4           that the staff heard about three cases and I'm sure it's not  
5           news to them, but three cases that might be put on the list,  
6           ATLAS, HRI, International Uranium, put on the list to take a  
7           look at, among others, to see what problems do those evidence  
8           here; is indeed there a problem and how do you fix that.

9                        So we keep coming back to Tony's suggestion.  
10          Larry, why don't we go -- you wanted to ask a question and then  
11                        we'll go to Jill. Go ahead.

12          CHANDLER: I did. And by the way, I guess we heard about some  
13          other cases, I think people had mentioned LES, people mentioned  
14                        Vogtle, if we want to put those all into the pot for  
15   consideration.

16          But really a point of clarification, because we've been dancing  
17          around an issue. We're here discussing whether changes to our  
18                        rules of practice, part two, in a very broad sense, are  
19          appropriate. Jim has very clearly expressed his reading of the  
20                        SRM. To perhaps a lesser extent, others have, as well, that  
21                        it's sort of a preordained outcome to the process, with the  
22   single objective.

23                        But from -- if I could sort of, for our purposes, as we go  
24                        through this, if I could put maybe Ellen, Jay, Mike McGarry  
25                        conveniently left, George is here, and Dave on the spot, from

1           an industry perspective, am I hearing the concerns focusing  
2           more on the type of process -- that is, a formal versus an  
3           informal process, with a preference towards the formal because  
4           it may be more manageable, or is it more literally a case  
5           management issue? That is to say, irrespective of the process,  
6           it boils down to case management concerns, for which the  
7           parties, as well as, perhaps in some instances, the presiding  
8           tribunal may have some responsibility.

9 CAMERON: I think that's within this agenda item that we're on.

10           So let's start with George and go to Ellen, Katie, Dave, Jay.

11                       CHANDLER: I'd start with Jay.

12                       CAMERON: We'll start with George.

13 EDGAR: Larry, my answer to you would be it's both. It's there  
14 are case management issues, but as I've previously indicated, I  
15 think the Commission oversight policy statement, the way the  
16 boards have adopted some of those suggestions, have been  
17 encouraging, but there are some process issues that you need to  
18                                       examine now.

19           I think there are some changes that you need to codify now to  
20 build some permanence into that process. There are elements of  
21 these proceedings that don't require and should not require  
22 formal process. I would particularly urge consideration of  
23 whether there should be any presumption on cross examination,  
24                                       particularly on technical issues.

25           Certain types of cases should preserve that option, but for the



not necessary.

Maybe there are some features of it that should be retained. I believe that a lot more can be done on the paper, allowing full participation on the paper. I think there are opportunities to get the views of the parties, all of the parties, out on the table, but that the trial type trapping or the typical things that we think of as a more formal process aren't necessarily helpful to reaching that ultimately right, correct, sound conclusion.

CAMERON: Katie?

SWEENEY: We're not advocating the elimination of subpart (1).

It has worked smoothly for industry in quite a few cases. I think in the cases that we wrote down that have been a problem, better case management would help resolve quite a few of the issues there.

LASHWAY: I might just add, I think it's both. Again, I think we're in agreement on that. But clearly subpart (1) has been a terrific process for a variety of some of the materials licensees.

But case management clearly has been the problem and I think the tools are in the regulations now, as George pointed out.

For example, the Commission oversight and their ability to intervene suasante. The ability of a presiding officer to bring in a technical expert, like they did in the HRI proceeding, proved very useful with respect to ground water. I



1 think Judge Bloch knows more than he ever wanted to about the  
2 West Water Canyon member aquifer in northern New Mexico, 10,000  
3 pages filed on that issue.

4 So I think the tools are there and I just -- you know, I  
5 recommend that they be used.

6 CAMERON: Ellen wants to add one thing. Go ahead.

7 GINSBERG: Small lapse. I just wanted to mention that we've  
8 been talking about not just problems, but potential solutions,  
9 and one of the potential solutions that I wanted to identify is  
10 that the NRC has already implemented subpart (m) and from my  
11 perspective, from the industry's perspective, that provides a  
12 good model in which some of the concepts that we've talked  
13 about here might be -- or a way that the concepts might be  
14 used, broadened.

15 CAMERON: I guess the big question is when you would apply  
16 those subpart -- the question is when -- we've heard a lot of  
17 suggestions about changes, but when would -- what types of  
18 proceedings, when should they apply, but we'll get to that.  
19 I'm going to go to Jay and then we're going to go over to Tony  
20 and Jill and --

21 RICCIO: I'd like to go, so I can get out of here.

22 CAMERON: Okay.

23 RICCIO: Thanks, Larry. I'm not sure the NEI is going to feel  
24 the same way when I get my hands on them. I just wanted to say  
25 I asked this question yesterday to the industry.

Would be still willing to give away your rights to cross examination and discovery if your clients are being asked to take the hit, and I've yet to hear a response out of the industry and I expect and I'll say that the answer is probably no.

GINSBURG: Let me speak for myself here. The industry, if there was a proposal to either eliminate or largely restrict cross examination, I believe that the industry would agree to that.

ROISMAN: In enforcement proceedings?

GINSBERG: I think enforcement proceedings need to be characterized differently.

RICCIO: Because it's your rights that would be getting circumscribed.

GINSBURG: No. I think there are a lot of individual rights that are at issue in enforcement proceedings and they are not necessarily the utility's.

RICCIO: The last point I wanted to make --

CAMERON: Tony? Tony, we won't let your comment go unsaid, but  
let's just try to keep it a little bit organized.

RICCIO: The last comment I wanted to make, you actually raised the question in the original agenda as to whether it was appropriate to circumscribe the public's rights in the review of Yucca Mountain.

CAMERON: I don't -- just for the record, it wasn't phrased

like that.

RICCIO: No, it wasn't phrased like that, but that's the gist of it. Other alternative means of having a hearing. Check out footnote seven, you've already promised the public a formal hearing. We're going to hold you to that promise, although apparently the industry's memory is lapsing again as to the promises that were cut back in the '80s.

It was a pleasure discussing these issues with you all and I'm sure we'll see you around campus.

CAMERON: Okay. Jim, thank you for being here on the high level waste licensing proceeding issue that was flagged in the agenda.

Mal Murphy had some words to say on that when he comes back, and I'm sorry that he is not here now to sort of follow-up on what you said.

RICCIO: It's in footnote seven, on the SECY paper that was on the web site. I don't believe it's in the packet.

CAMERON: Yes, okay. I understand what you're saying about the SECY paper. All right. Jay?

SILBERG: I think it's both. I've had a lot of experience in the past two years with case management, as I think it ought to be applied, and, Judge Bollwerk, if you'll cover your ears so you won't blush, but --

BOLLWERK: I've been thinking about leaving this for a while.

CAMERON: We have a booth in the back of the room that you can

listen.

SILBERG: We have had problems in that proceeding. Frankly, they've been with the staff review in terms of getting through an expeditious and effective process so far, and we've yet to go to hearing. So I don't want to give the judge my perpetual blessings, but I think he has run the case as it should have been run. I think he has put tough time restrictions on all parties.

I think he has limited discovery on all parties. He has imposed the Rule 26, open discovery process, where we have basically opened up a public document room and supposedly the state has done the same.

I think the process so far has worked well. I think there still are many areas in which cross examination is not the best engine to get to a scientifically correct, sound, technically supportable, et cetera, decision.

I've been in a lot of hearings in the past where the same witness who was discredited in three prior proceedings was allowed to step on the witness stand and put forth his credentials and his statements and the board was willing to let it in for what it's worth, even though we tried to strike the testimony in advance, and he let it in for what it was worth and it was worth nothing.

I think there are a lot of improvements that need to be made.

I think there are lots of areas where cross examination -- the

1 winner in cross examination is the best lawyer and not the  
2 soundest witness, and I think if a case where Tony is on the  
3 other side will have a very different result than a case where  
4 lawyer X is on the other side, because Tony is, frankly, more  
5 skilled than lawyer X.

6 And I'm not sure that that's the way technical decisions are  
7 best made. I think we really need to take a hard look at that.

8 CAMERON: Thanks, Jay. Your last comment does get us to an  
9 issue that we're going to discuss shortly, which is the issue  
10 of making sure that the public litigant has the best  
11 preparation for these particular -- it's the whole resource  
12 issue. There's a number of those raised.

13 And I guess that we would want to add the phrase to Bollwerk to  
14 our lexicon to mean to manage a case effectively.

15 BOLLWERK: Set me up for a fall.

16 CAMERON: Larry, do you have a quick clarification before we go  
17 to Tony?

18 CHANDLER: Yes. Having asked the question earlier, Jay, I  
19 understand the concerns that you've raised. In some cases,  
20 it's staff review; in some cases, it's inadequacy of the  
21 application that's submitted by the applicant, which underlies  
22 issues; in some cases, case management types of concerns.

23 Is there a preference that you see for a formal process with  
24 appropriate case management or informal process which doesn't  
25 have some of these ingrained at all?

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1 substantive, and it only underscores the point, the first point  
2 that I wanted to make, which is there is absolutely not a shred  
3 of scientifically reliable, admissible evidence that the  
4 Commission needs to do anything to change its current hearing  
5 process in the direction that these distinguished lawyers have  
6 recommended.

7 Each of them has a little anecdote to tell and when you get to  
8 the root of their anecdote, it turns out some hearing board  
9 chairman didn't do it the way they wished they would, and I  
10 think Jay just put his finger on acknowledging that that was  
11 really the case.

12 Now, the hearing board chairmen have all the authority they  
13 need to control adjudicatory hearings. If they didn't have it  
14 in specific rules, they have it in 2.718. They can do pretty  
15 much whatever they want and there's very little limits on their  
16 power and when they choose to use it, they use it effectively,  
17 and when they choose not to use it, that's also effective.

18 Now, the party who gets gored by that particular decision  
19 always says, oh, we need to change the rules or we need another  
20 judge or the case manager -- you heard Bob talking about he  
21 didn't like some judges that showed up at Seabrook, and now we  
22 hear the people talking about the judges that they don't think  
23 are managing the mill tailing hearings properly, et cetera, et  
24 cetera.

25 I just think it just underscores that. We're talking here

about generic rulemaking and the Commission has a duty, and I'm sure it will see to it that that duty is carried out, to make sure that it doesn't begin to tinker with the system until it has some hard evidence that, A, there's a problem and, B, that it knows what the solutions to the problem are.

In that vein, I think it's important that two things be done in order to make that record. One, don't just review the cases that the industry tells you are the problem cases or, for that matter, that the intervenors tell you are the problem cases. Maybe more useful is to review the cases that everybody thinks worked.

You heard George Edgar say the ECCS hearing was a good example of a rulemaking that worked. I agree with you. It was an adjudicatory rulemaking. It had cross examination of scientific experts associated with it. It went on for a while. It came to some important, interesting conclusions that still remain the law in the agency today, and it involved a huge amount of disclosure of internal documents of the agency as part of that process.

And a lot of the cross examination was done by scientists of scientists, a process which the Commission's rules have long allowed, but is not used nearly as much as it could be, partly because often, at least on the intervenor side, there isn't a scientist available to them because of resource limitations to do that type of examination.



1 But regardless of the ECCS or any other, I think we should look  
2 at the hearings that worked, as well as the ones that didn't  
3 work and I think there should be a pretty broad definition.

4 What does worked mean? And really study this question.

5 I remember at one time the licensing -- I think Atomic Safety  
6 and Licensing Appeal Board addressed the question of whether or  
7 not intervenors were of any use in the hearing process in a  
8 case in Louisiana in the early '70s, as I remember, and they  
9 wrote a rather ringing endorsement of and gave some specific  
10 examples of why they thought the intervenors were useful in the  
11 process and provided a useful input.

12 That kind of historical review to find out when have the boards  
13 ever commented upon this, because no one will know better. In  
14 many ways, there's only one expert at this table -- that's Paul  
15 -- on these questions, because he sits there as the hearing  
16 examiner listening to these different points of view and seeing  
17 the case evolve in front of him.

18 So he has a better sense of whether or not he's working on a  
19 broken machine or whether he's driving a perfectly good machine  
20 that sometimes runs into potholes like you do when you drive on  
21 a rough road.

22 So the first point is broaden the scope of what kind of cases  
23 you look at. Secondly, do it just like the engineers do it  
24 when they look at nuclear events; look for root causes. Don't  
25 look for the -- you know, it isn't automatically a problem when

Why did cross examination take that long? What was the root cause of that? Was it because, as some people have said, that the examination was repetitive and endless and went on and on, and then was that because the hearing examiner wasn't paying attention and he let it go on and on repetitively, or was something else going on? Really find root causes. You've got the records, it's not hard to do that.

First of all, we have an entire court system dictated by the Constitution of the United States and every state in the union that says that they can be. We have the Supreme Court having just recently articulated, in the cases of Dalbert, Cumho, and the Joyner cases, the idea that scientific testimony in the Federal court system is an important component of reaching decisions and subject to all kinds of examinations and tests and so forth, and cross examination is a piece of that.

There is nothing about the scientific question that doesn't  
lend itself to cross examination. Is it bad when it's bad

1 cross? Sure. Is it better when it's good cross? You bet.

2 You run a system in which you make sure one party has an  
3 inadequate amount of resources and they are not likely to get  
4 you the best examination and they're not likely to get the best  
5 advice from technical people.

6 I can tell you personally, in the Indian Point operating  
7 license hearing in 1970, I spent a morning cross examining one  
8 witness on the question of whether or not the droplet size of  
9 the bisulfate, I think is the substance, spray that was to be  
10 used in the event of an accident to control iodine releases in  
11 a pressurized water reactor containment, whether the droplet  
12 size would be the size that it was assumed it was going to be.  
13 The size made a difference as to how much iodine it absorbed.  
14 And at the end of the cross examination, the witness, who was a  
15 staff person, came off the witness stand and said to me, "That  
16 is absolutely the best cross examination I have ever  
17 experienced." Since, of course, you were not talking about the  
18 relevant point. The relevant point isn't the droplet size.

19 The relevant point is the effectiveness of the filters.

20 Who knew? I could understand the droplet size. I didn't  
21 understand the effectiveness of the filters issue at all. So I  
22 spent the morning doing that, \$1,000 worth of expert consulting  
23 would have solved that problem and I would have spent much less  
24 time doing more useful cross examination.

25 So the fact that it was good, and I appreciate Jay's

1 compliment, didn't make it useful and it wasn't useful for the  
2 hearing or anything else.

3 But I believe cross examination inherently is a way of getting  
4 at truth and is a valuable -- is a valuable tool.

5 The Commission shouldn't -- I don't mean that they shouldn't  
6 abandon it casually. They shouldn't abandon it. They should  
7 maintain it and it should be a part of the process and  
8 licensing hearings should be absolutely continued with that.

9 Discovery; suggestions on reducing the time necessary for  
10 discovery, I've heard those. Mal talked about some things that  
11 are being done in the waste project. Jay suggested that there  
12 were things that were being done in one of his cases to try to  
13 deal with that. I think those are excellent suggestions and I

14 think that they speed up the process and that they are  
15 beneficial; easy, extensive, ready access to documents.

16 But it has to be a total data dome. It can't simply be all the  
17 documents, we don't care, you see. If there are conflicts  
18 among the technical people for the utility or for the staff,  
19 they should be aired. Why should it -- I mean, I can't think  
20 of a logical reason why a legitimate conflict that existed at  
21 the staff level or at the utility or between the staff and the  
22 utility shouldn't get to the hearing board if that dispute  
23 seems to be important to the public, but they don't know that  
24 it's important because they don't know that it exists unless  
25 the underlying documents are there.

Now, I complain about it, but I've never proposed and would not propose that the right be removed and I do what a lot of you have suggested here; I go to the hearing board or, in that case, the judge, and I say I want you to put some controls on this, and sometimes they agree and sometimes they don't, and I end up with months of discovery which should be done in weeks and depositions of witnesses that go on for days and days, when they should have gone on only for hours and hours. But those rights, whenever you're the party who doesn't want to see the outcome, those rights are very important to you and it's not because they cause delay, it's because they find information that helps you fight your battle and anything short of that is inadequate.

CAMERON: Thank you, Tony. Before we go to Jill, who has been waiting patiently, and I think Mal wants to play off one of your comments, I want to specifically ask the people around the

1 table for -- to try to close on this.

2 Tony has made a suggestion earlier, and a number of us have  
3 talked about -- a number of you have talked about it, about an  
4 evaluation of the cases to find out is there a problem, what is  
5 the problem, and he made a couple of suggestions right here in  
6 terms of looking for root causes and, of course, what do you  
7 review these cases against in terms of to decide what worked or  
8 what didn't work.

9 And yesterday he suggested going to the -- one of the  
10 performance objectives that the NRC has, substantive soundness.

11 I would think that maybe the work that we did on the objective  
12 statement or, for shorthand, it's the "NRC should" now, but  
13 maybe that statement could be used as sort of the litmus test  
14 to examine this question.

15 But what I want to know from people is there is a process, a  
16 methodology suggestion to try to get answers on the floor, and

17 I want to know what people think about that in terms of  
18 recommendations to the NRC on whether that is something that  
19 should be pursued.

20 With that, I'm going to go to Jill and then Mal.

21 ZAMEK: Do I respond to that?

22 CAMERON: No. Whatever you wanted to say. I know you've been  
23 waiting.

24 ZAMEK: I would like to respond to Dave's example and he  
25 perceives that case you're referring to as low risk, but I want

But because of their powerful beliefs and their really powerless situation, because speaking from an intervenor's point of view, we're desperate and we do whatever it takes to attempt to get our point across.

So I strongly believe that we should maintain the formal hearings, with the discovery and with cross examination, but we need the funding in order for this to be an effective process.

know, Jill's comments were reflective of those.

Let's go to Mal and then let's go over to -- we'll go to Jay, Dave, George, and then we'll come back over to Jeff and Paul.

1 MURPHY: Thanks, Chip. I do have a couple of quick points and  
2 I did want to play off of something that Tony mentioned, and  
3 that is that access, the facilitating discovery and access to  
4 documents.

5 Again, I urge everybody who is not familiar with it to take a  
6 look at subpart (j) in that respect. On the question of  
7 whether or not it should be a complete data dump, and you can  
8 argue about what data is really needed, et cetera, but on that  
9 question, under subpart (j) and in the high level waste  
10 licensing proceedings, we have an LSN, licensing support  
11 network administrator, for example, who works in the next  
12 building, works for Paul, who is essentially in charge of  
13 making sure that everybody who wants to participate in the  
14 licensing proceeding complies with the requirements for  
15 document discovery and for loading up their web site and making  
16 sure it's accessible to the public on an easy basis, et cetera.

17 There will be disputes over whether or not the Department of  
18 Energy or the NRC staff, for example, has placed all of its  
19 relevant or could lead to admissible evidence kind of documents  
20 in the LSN and under the rule, the presiding officer will  
21 decide those challenges. So that kind of mechanism, that  
22 vehicle is in place in subpart (j) for the high level waste  
23 proceeding.

24 And I have felt for years that assuming our system works the  
25 way we intended it to work when we originally negotiated a



1 precursor to the current system, that it will eventually be  
2 used in all NRC licensing proceedings or all complex,  
3 complicated, significant ones.

4 Obviously, you're not going to make every dentist put his  
5 records in an LSN when he wants to reload his X-ray machine or  
6 whatever the hell they do to get their -- but for serious  
7 licensing cases, I think ultimately something like this will  
8 ultimately be, will eventually be used, and I'd certainly urge  
9 the Commission and everybody here at the table to look at that  
10 and for the Commission to take a look at that to see if some of  
11 the problems that some people have raised in the last day  
12 couldn't be addressed by the use of something similar to  
13 subpart (j) in reactor licensing or license renewals or the  
14 uranium side of it, which I'm totally unfamiliar with, et  
15 cetera.

16 One other point that I want to associate myself with, partly at  
17 least, with some of Tony's remarks. It's not only important to  
18 an opponent in a licensing process. It's not only important to  
19 someone who wants to get to know that all of this whole panoply  
20 of protections, if you will, cross examination, complete  
21 document discovery, motions practice, et cetera, are available.

22 I'm suggesting strongly that for a neutral party, such as Nye  
23 County, that is also very important because we have been  
24 telling and the NRC staff has been telling and the Department  
25 of Energy has been telling the public in the State of Nevada,

1           and I speak only on behalf of the folks who live in Nye County  
2           and whose government is officially neutral, for years, that  
3           Yucca Mountain will not become a repository unless and until  
4           the NRC grants it a license or a construction authorization or  
5           however you want to phrase it, after a full trial type  
6           exposition of all of the technical and scientific issues.

7           So that the people in my area, whether opposed to the  
8           repository or in support of the repository, view the Department  
9           of Energy as on a mission to characterize the site and if it's  
10          adequate, to then build a repository there.

11          But they have been -- the message they have received from all  
12          parties, including us and the DOE and the NRC and everybody  
13          else is that the mission of the NRC in the high level waste  
14          process is to arrive at the correct decision, after a full,  
15          fair, and complete, transparent exposition of all of the  
16          technical issues.

17          So from my point of view, it's not only important to the  
18          utility industry that DOE be able to succeed in the high level  
19          waste repository, so they have someplace to place their excess  
20          material. I don't even like the word waste. And it's not only  
21          important to DOE that it be able to state its case. I think  
22          it's -- and the State of Nevada to be able to fully oppose the  
23          repository. It's important to a neutral party that not only do  
24          we -- and we'll have some issues -- not only are we able to  
25          litigate our issues, but that our public is satisfied that the

1 correct decision has been made or at least there has been a  
2 legitimate, serious, good faith, good-hearted attempt to arrive  
3 at a correct decision after all of the issues have been fully  
4 litigated.

5 CAMERON: So just to put a finer point on that and maybe you  
6 already did, it's pretty clear that in terms of the issue of  
7 the -- since we had a comment on that -- the issue of making  
8 the high level waste licensing proceeding informal, whatever  
9 that means, what would your views be on that?

10 MURPHY: In this context, I hate that word informal, but I  
11 don't think -- we'd have to see. I mean, the devil is in the  
12 details, obviously. I don't personally have any objection to  
13 making some changes to the licensing process. Obviously,  
14 everything can be improved or at least subject to examination  
15 in that regard.

16 But I think whatever is done, and I read, incidentally, the SRM  
17 not to foreclose at least the high level waste process  
18 licensing and reactor licensing or whatever, I read the SRM as  
19 indicating that the Commission wants flexibility in order to  
20 somewhat relax or make less rigid some of their licensing  
21 hearings, but not necessarily to apply that to every case  
22 before it.

23 But certainly I think some improvements can be made, but the  
24 basic -- the historical, fundamental attributes of a full  
25 adjudicative process in which all parties get a chance to air

I mean, it would be silly to do it in any other way, I would think, and the right to cross examine witnesses, make motions, present arguments, et cetera.

As long as those basic attributes of a fundamental adjudicatory process are retained, how you massage the margins to make the system more efficient, I think, is not that important and I don't think it's all that important to the public.

And with respect to cross examination, let me just close with this one thought. I've never met a scientist, and I've worked with lots of them and I've cross examined lots of them and we've got lots of them working for us now and they all just have nightmares about being cross examined by lawyers in proceedings, even though some of them make a pretty decent living doing it.

But cross examination has, from the days of Galileo, been a fundamental attribute of the scientific method. Every one of these people, I mean, that's what scientific peer review is, for crying out loud. They get together in a room and sometimes



1           But clearly, I mean, by allowing cross examination in the  
2           licensing process, it seems to me all we're doing is extending  
3                           the scientific method, in any case.

4       CAMERON: Thanks, Mal. What I'd like to do now is go to finish  
5           off the cards that are up, so that we can move on to these  
6           other important issues, and go around this way, starting with  
7           Jay, and if you could, I would like to hear opinions about the  
8           suggestion about the systematic evaluation of cases to find out  
9           what exactly the problems are here as opposed to what has been  
10                           referred to as an anecdotal approach.

11   Jay, go ahead.

12           SILBERG: First, I like Mal's formulation of full, fair,  
13           complete, transparent analysis to arrive at the correct  
14           decision. I guess the problem I have is that we're adopting  
15           one particular paradigm to do that and I think I do disagree  
16           with you that adjudicatory, legal cross examination is the only  
17                           or the best way to do it.

18           The fact that you have scientific peer review, we, in fact, do  
19           design technical projects using the scientific method. We  
20           built the space shuttle with scientific peer review and not  
21                           with lawyers cross examining the witnesses.

22           We developed the internet not with lawyers cross examining  
23           scientific witnesses, but with scientific peer review. It  
24           seems to me that a system that is more shaped by the scientists  
25           debating rather than the lawyers debating is probably one which

1 is more likely to arrive at the truth, and I think that is the  
2 system that by and large exists today outside of the hearing  
3 process.

4 I would hope that the more of that we would get to, the better  
5 we would be. I don't think that the legal cross examination is  
6 necessarily identical to or even as good as the scientific  
7 system that you described.

8 In terms of whether we need an objective third-party approach  
9 instead of anecdotal, I think what you're going to come back  
10 with is anecdotal anyway, because what we're doing is looking  
11 at a series of case studies or a series of anecdotes and I  
12 think that the folks that will be looking at this process  
13 certainly within the Commission have been through these  
14 hearings and they have collected, if you will, the anecdotes  
15 from all the hearings, the good ones and the bad ones, the ones  
16 that worked and the ones that didn't work.

17 And I don't have a problem if Joe and Larry and their minions  
18 put together that in a more formal way. I think to go outside  
19 and to charter an academic body or the National Association of  
20 -- National Academy of Public Administration or somebody like  
21 that to do it, will put this whole process into dead storage  
22 for an extended period of time and I think we will miss the  
23 opportunity that we talked about early on to look at this issue  
24 during a window, and we may actually have some time before we  
25 get deluged with another round of hearings.

One thing I would like to get into, because I'm going to have to leave in a little while, is the intervenor funding issue.

CAMERON: And I specifically want you to be here for that and I would like to do it all at one time. Can you just hold that for a couple of minutes and let's see if we can get through this and then we can --

CAMERON: And is he going to have to respond?

I get to manage this case.

MURPHY: The big difference, the essential difference between scientific peer review and what I refer to with cross examination, of course, is that one of them is done behind closed doors and the other is done in the open, and available at least to be reported in the press.

Secondly, you mentioned being -- you don't think lawyers questioning scientists adds that much to the process. Would it make you feel more comfortable if your hydrologist was



1                   questioned by my hydrologist rather than by the lawyer?

2   Because that's possible.

3           I can guarantee you, Jay, you've worked with enough of them  
4           yourself, if you want to unduly prolong this or any other  
5           licensing proceeding, you have the scientists question the  
6           other scientists on the witness stand. It will never end.

7   The questioning will be interminable.

8           SILBERG: That's what we do in the review process before you  
9   get to hearing.

10          MURPHY: Well, you still have to do some of it in the light of  
11          day. And even under the NRC rules, there's nothing that says  
12          -- we don't have a complete monopoly on this process, as we  
13          lawyers have been able to maintain in others. There is nothing  
14   in the NRC rules that would prohibit --

15   CHANDLER: It's explicitly provided.

16          MURPHY: Right, exactly. It's explicitly provided. But if you  
17          want to see this thing go 15 years, you have the scientists  
18          question each other during this process. It will never end.

19          CAMERON: Thanks. Let's go to Dave or Katie, who wants to  
20   talk?

21          LASHWAY: Just quickly. I think the logical approach outlined  
22   by Tony and modified by Jay we would agree to.

23                   But let me add, Tony, that we are not in any way arguing  
24           against the outcomes, the results from the presiding officers  
25   in these various cases that we mentioned.

So that's not the negative, in and of itself, and the protracted litigation wasn't the negative, in and of itself. However, the legitimacy of the process was called into question

Where does that leave the licensee? The licensee has gone through this long process at great expense, but isn't really sure or secure in the license, even though it's been upheld, because the legitimacy of the process has been called into question.

So all we're trying to point out is we're not complaining about certain judges, we're not saying this judge is better than this judge, but what we are saying is that when managing the process

14 BOLLWERK: I just want to say two things quickly. First, in  
15 terms of case management, that's obviously a problem that I  
16 have to deal with. I've only been in this job as a permanent  
17 chief judge for three months, but it's something we're  
18 beginning to address and the Commission has made it clear that  
19 they expect the cases to be well managed, and so do I.  
20 So that's something we're going to move forward on, obviously,  
21 on a regular basis. We already are talking about that quite a  
22 bit.

23 And it's an important thing. As I mentioned, I do teach a  
24 course at the Judicial College where I talk about case  
25 management and complex cases. So I understand fully the

1 concerns there and we need to deal with that.

2 The other thing I just wanted to mention briefly is the  
3 informal process and the way it was put together, and since I  
4 drafted that rule back ten years ago, I kind of know why it was  
5 done the way it was. Some people like Marty Mulls can probably  
6 speak to it as well who were involved with it.

7 But when that was -- the idea there -- and I should also  
8 mention that was an experiment. It was done ten years ago and  
9 it probably is time to re-look at it. I would be the first one  
10 to admit that.

11 But the idea there was really to make two fundamental  
12 distinctions between the formal process. One was to lower the  
13 threshold, in many instances, the threshold for contentions.  
14 There really is no threshold, other than if you have something  
15 that relates to the proceeding.

16 Maybe that was going too far in terms of calling it informal,  
17 but that was the idea. Allow the -- in theory, the way the  
18 Commission had laid this out, these proceedings were supposed  
19 to be less complicated, arguably, than what was going on on the  
20 reactor area. They may not have turned out to be that way and  
21 that's one of the things that needs to be looked at.

22 The other idea was put into the rule and besides sort of  
23 lowering the ability of folks to get in and participate in  
24 terms of at least the issues that they brought forward, was the  
25 idea that the presiding officer was given more responsibility

for developing the record.

There are two sides to that. One is the presiding officer, obviously, to some degree, we do that now. We can question witnesses even in the formal proceeding. But I think there's some uncertainty among the board and the presiding officers about how far they should go in that, even now, and it's something we're particularly comfortable with. It's something that we need to continue to look at.

But if that's really what is wanted, then that's something we're going to have to maybe take more of a role in, depending on how the rule is written. But right now, the parties, on a formal proceeding, there's the general back and forth of the adversary process. That informal rule was written to highlight something different and maybe that hasn't quite come out the way it should have. Maybe that isn't something that should be in the rule. That's something that maybe needs to be looked at in terms of the whole informal process. So those were two things that I would think we would kind of look at.

And someone talked about subpart (m). Subpart (m) does have some of the informality, but, of course, one of the things it does is raises the contention standard back up again. Is that how you want the whole process to be played through? I leave that obviously to you all to talk about.

One other thing and we've sort of thrown this idea out on the

1           table, as part of the process at the Commission in terms of the  
2           SECY paper is should there be a process whereby the folks,  
3           whether it's the intervenors or the licensee, depending on who  
4           is involved, they sort of choose the procedure they want. If  
5           an intervenor doesn't have the money, can't do a number of  
6           things, well, but they want to get their issues in, want to get  
7           them heard by a neutral presiding officer, maybe use an  
8           informal process with a lower threshold for contentions.  
9           They can come in and what they don't then have are all the  
10          panoply of things that go with the formal process, which  
11          includes discovery and cross examination, but nonetheless they  
12          don't have the high threshold for contentions. That was an  
13   idea that we had put on the table.  
14          Now, that has -- the devil is always in the details and there's  
15          obviously -- that could affect different things different ways  
16          in terms of who participates, but that may be something you  
17   want to think about, again, as well.  
18          Again, if folks really want to get into the process, but they  
19          can't participate in terms of having experts, but they want to  
20          have their issues heard, that may be one way to deal with it.  
21          But there is a fundamental question, I think, about the  
22          complexity of the cases and at least with the way the informal  
23          process now works as to whether, for the really complex cases,  
24   whether, putting aside the distinction between reactors and  
25          materials, whether that is, I think, an appropriate dividing

line.

One of the things we found, interestingly enough, in the reactor operating license cases, which are informal, and you would think, given their exam, they'd be the most -- when we get into simulators, where you've got a number of people on a floor saying who did what when, then we get into all kinds of problems and you cannot cross examine an affidavit. You just can't do it. All you get is more affidavits in and then you're -- especially if you're getting into credibility questions, who is telling the truth on these affidavits.

So, again, I would throw that on the floor as something to think about, as well.

CAMERON: Okay. Thanks, Paul. I think that you raised an issue that we're going to get into in about two minutes, which is the threshold on contentions. Let's finish this off with Jeff, so that we can get into these other issues, and we'll see if we have time to go back to Dave later.

LASHWAY: I just wanted to quickly add just one point. With respect to the questions from the presiding officer, in the subpart (1) context, we have found that incredibly useful. Judge Bloch was very effective and efficient at using questions to the various parties to get to the heart of the various issues when they were complex issues; our medicine man versus their medicine man, their hydrologist versus our hydrologist.

1 And the going back and forth on the papers was very difficult.

2 CAMERON: Thank you, Dave. Jeff?

3 LUBBERS: Just a few observations. I think it's very important  
4 to encourage the judges, the presiding judges to have fairly  
5 stiff backbone on these kinds of issues, whether to admit  
6 evidence, whether to be sort of tough-minded on limiting --  
7 trying to put some limits on cross examination, because it's  
8 always -- a judge will never be reversed for letting in  
9 evidence, for the weight of the evidence. So they're always  
10 going to have a tendency to sort of err on the side of letting  
11 things in.

12 And if judges are not subject to performance appraisals and  
13 performance evaluations, then you have to rely on the chief to  
14 sort of keep some good standards there.

15 And for example, I've seen some administrative proceedings with  
16 multi-parties where each lawyer representing the various parties  
17 or, in this case, intervenors, I guess, is permitted to do his  
18 or her own cross examination of the witness, and you get a lot  
19 of redundancy and repetition.

20 So, again, that's something that I think the Commission would  
21 have to pay attention to, try to make sure the lead attorneys  
22 are designated, if you have similar issues. And here is a  
23 situation where intervenor funding might be helpful, because if  
24 you fund intervenors, one of the conditions might be that you  
25 try to organize yourselves in terms of lead attorneys for cross



1 examination purposes. That's point one.

2 Point two, with respect to the study that we've talked about,  
3 again, it's too bad the administrative conference isn't around  
4 to do this study, it sounds like a perfect study for the old  
5 administrative conference to do.

6 But we used to try to do some statistical studies on agency  
7 cases and so I would hope that you have the resources to go  
8 back into the files in selected or maybe all the cases under  
9 subpart (g) and subpart (l) and various subparts, and try to do  
10 an analysis of an elapsed time study; where are the elapsed  
11 times in the pre-hearing, the hearing and the post-hearing  
12 stages.

13 We came up with about 21 steps in a -- as a generic timeline  
14 for administrative cases, seven in each of those stages, and it  
15 can be very illuminating. You also have to take into account  
16 sort of tolling of the case, for some reason. You can't really  
17 count that the same way.

18 So I would hope that you can just assign somebody to do such a  
19 study here at the NRC.

20 Third, we haven't talked at all about ADR and I would hope that  
21 there is some way that some forms of alternative dispute  
22 resolution, mediation techniques could be used to try to settle  
23 issues or narrow the issues before the case gets to hearing.

24 Fourth, we haven't talked much about the review by the  
25 Commission; does the Commission review every case, is there

Last is sort of an unrelated point. We've talked some about scientific issues. I know that there are some issues that have scientific review boards, scientific advisory committees. EPA has one.

You can sort of project issues down the road that you may be encountering as a prelude to generic rulemaking. I think it might be useful for the NRC to consider the EPA model of having a scientific advisory board to throw some of these futuristic type questions for resolution before it gets caught up in the individual case proceedings.

LUBBERS: Naive perspective.

1 CAMERON: I didn't say that. But thank you and also for -- we  
2 do want to get to the suite of issues and a lot of them thread  
3 to this intervenor funding issue and I think we have to pay  
4 attention to that major set of issues before we adjourn here  
5 today.

6 And let's start off with Jay and then go to Susan. Jay? And  
7 we can -- I mean, fold whatever you want from that suite of  
8 issues into your statement.

9 SILBERG: I don't want to take up all the time and I think I  
10 could do that. Intervenor funding, I think, is a basic issue  
11 that I thought was resolved a couple decades ago. There are  
12 several models that one can adopt.

13 One is a model in which an independent agency is created to  
14 make decisions, to review issues, grant or deny licenses, set  
15 standards, and that those decisions, those actions by the  
16 independent agency are subject to challenge.  
17 There is another model, the common law model, people want to do  
18 something and someone doesn't want it, you go to court. There  
19 is no independent agency other than the court and the court  
20 will decide.

21 Where the government has created a knowledgeable independent  
22 agency to make those determinations, the idea of establishing  
23 intervenor funding to create yet another level of independent  
24 review seems to cut the heart out from the purpose of having an  
25 independent agency in the first place.

1           We do have checks and balances. Do we need an independent  
2           agency to check the independent agency? Do we then need  
3           another independent agency to check the independent agency  
4           that's checking the independent agency? And then do we need to  
5           have fully funded intervenors who can check the independent  
6           agency that's checking the independent agency that's checking  
7           the independent agency?

8           At some point, we have to go with a system that we are creating  
9           a body that is chartered to make the decision. If people are  
10          unhappy with those decisions, they have a right to challenge  
11          them. But does the government have an obligation, in essence,  
12          to create a shadow agency, so that anyone who wishes to  
13          challenge that determination, in essence, will create a new  
14          mini agency, again, independent, to go through the whole  
15          process again, because they didn't like the initial result.  
16          It seems to me if you're going to go that route, we don't need  
17          the NRC. We ought to let the applicants do whatever they want  
18          and then if intervenors want to come in and maybe we fully fund  
19          them as the check on the applicant.

20          But having set up one check and one balance, I don't know where  
21          you stop. The idea that intervenors should be, quote, fully  
22          funded, whatever that means, and that, in essence, the  
23          applicants will have to pay not only for the NRC review, but  
24          also for the intervenor's review, and then what if someone  
25          wants to come in and support the application, the applicants

1   have to fund that review as well.

2                   I simply don't know where you cut off the process and  
3           philosophically, if we are to have agencies that are chartered  
4           by the government to make these determinations, the idea that  
5           there ought to be a fully funded shadow agency to second guess  
6           those determinations, I think, is just going the wrong way and  
7           is not what -- certainly what Congress had in mind in creating  
8           the whole idea of independent agencies, those going back 100  
9   years, or specifically in this case.

10           I just think it would be a bad thing philosophically, a bad  
11           thing governmentally. If people want to devote their own  
12           resources, that's fine, but I don't think that the government  
13           should need to support that. I think it would raise very  
14           difficult questions of who gets the funding and how much  
15           funding they get and what happens if six intervenors show up in  
16           a hearing, as often is the case, do they all get funded; do we  
17           allocate one pile of money and who is going to divide it  
18           amongst them and how much should that money be, how many  
19           witnesses do they get to hire, and which witnesses.

20           I think you go down a slippery slope and it becomes even more  
21   than an unmanageable process.

22           CAMERON: Thanks, Jay. Let's go to Susan and then we'll got to  
23   Bob Backus.

24           HIATT: First, I want to touch on a point that Jeff raised  
25           about elapsed time studies. These are very complex proceedings

Much of that time delay was attributable to delays in staff review, actual delays by the applicant, delays in construction.

I mean, there are things going on outside of the hearing process that often contribute to the apparent delay and the intervenors had nothing to do with it.

CAMERON: I think that's the important point.

HIATT: I'm not sure you could go back to like a transcript or

You'd have to look at the staff review and the SER dates and everything else. But it does add some complexity to that.

With regard to Jay's comments, first, some of the logistical questions that you raised, well, how do you decide who gets the funding and how much. Those are things that agencies and

But I think there are some things that can be done to try to alleviate some of the burdens on intervenors from a cost basis

1                   that wouldn't necessarily involve writing a huge check.

2                   CAMERON: Thanks, Susan. You're indicating that there is a  
3                   spectrum of things that might be done to alleviate some  
4                   problems that you've seen, problems that Tony or Joe might have  
5                   brought up.

6                   Do you have any comment on Jay's shadow government issue, that  
7                   he connected to funding of intervenors?

8                   HIATT: I'd just say that something we did in Ohio, our  
9                   enabling legislation for the low level waste facility has  
10                  partial intervenor funding in it and we never got to experiment  
11                  with this because the process was canceled, more or less.  
12                  In raising in -- in that legislative process, I don't remember  
13                  anybody raising that kind of issue about it's a shadow  
14                  government. I think people recognized the lack of a level  
15                  playing field, that this would be a very controversial,  
16                  difficult to cite, difficult to build facility, and there would  
17                  be opposition and the question I think that kept arising is  
18                  what kind of opposition are you going to get.

19                  Are you going to get people rioting in the streets and that  
20                  sort of thing? Are you going to get people working within the  
21                  system and serving what I feel is an essential QA function?

22                  And I don't remember anybody arguing, well, it's a shadow  
23                  government. It's something we -- it's on the books in Ohio. I  
24                  don't know if -- I doubt it if will ever be implemented. But  
25                  it's something we wanted to try there and I don't remember



CAMERON: Thank you. That's useful to know that there may be examples out there that can be looked at. Bob?

I wanted to talk about the ADR thing that Jeff mentioned, because I'm a big believer in ADR. I'm a mediator. I do a lot of mediations for our courts in New Hampshire, do them privately, and I really believe in the ADR process and particularly mediation.

Reactor license extensions, that might be possible. Maybe you could do a mediation and say, okay, you give them an extra five years, but we don't want the thing to run for 20 years. I don't even know whether the jurisdiction or the authority is there for that.

1 But the place where I think we might try ADR is I think where  
2 we are right now, and that is doing some negotiations that  
3 could result in changes to the hearing process and the  
4 regulations for those hearing process, and I think I'm the one  
5 that yesterday talked about a grand bargain.  
6 I think these folks in the industry have some things that they  
7 want. I don't think it's impossible that there could be some  
8 negotiations, some give and take, to have a negotiated  
9 rulemaking, which Jim Riccio would have my head because he says  
10 never do a negotiated rulemaking, but I'm willing to  
11 contemplate it.  
12 Obviously, some of the things we want are some of the things on  
13 the list. We'd like to see the contentions requirements  
14 reduced so we don't have to, in our view, prove your case  
15 before you get in. We'd like to see standing not made a big  
16 contested issue that takes a lot of time.  
17 The funding thing we've talked about a lot and I certainly  
18 agree with Susan. It's doable, but it's damn hard to do.  
19 There's a lot of devil in those details.  
20 And another thing we would want is an issue that's very  
21 contentious, because George has mentioned it several times, the  
22 Commission's intervention in particular things.  
23 I think he likes the Commission's intervention, because I think  
24 it's always worked out to be favorable to his client's  
25 interest. In my experience, it's not been favorable to my

1 client's interest. But one of the things we would want is some  
2 discussion about standards for Commission intervention, some  
3 objective standards for the Commission to intervene in  
4 proceedings.

5 I could go on with the list, but if there was an interest in  
6 talking about this, I think a mechanism could be set up to do  
7 it and arising out of this very process you've got going here,  
8 Chip.

9 CAMERON: Thanks, Bob. Mal Murphy certainly, if not -- he  
10 didn't explicitly recommend it, but I think that he implicitly  
11 supported the use of some type of a negotiated rulemaking or a  
12 discussion concept to set these types of rules, and maybe  
13 there's some -- maybe there is something that could be  
14 developed along those lines and we'll see if we can come back  
15 to that issue.

16 Let's go to Tony and, Tony, I don't know whether you want to  
17 comment on that, also, but whatever you want to say.

18 ROISMAN: I really want to go back to intervenor funding. Jay  
19 is, of course, right. It is an old issue. But its age doesn't  
20 make it any less relevant.

21 I think that many of -- as I look over this list of other  
22 items, which at least I and Bob are not going to have time to  
23 be here for, because of our flight this afternoon, but that  
24 many of them are problems which, if the parties to the  
25 litigation, forget about intervenor funding, if the parties to

If you had the resources to take advantage of the agency's openness with regard to all the licensing processes and meetings that are going on and so forth before the license gets noticed up, you wouldn't have any problem putting together the contentions that are relevant and, in fact, presumably, you would get to the ones that really mattered and along the way you may very well have, as a result of the give and take in those meetings, negotiated out or resolved or become satisfied that this particular issue is being dealt with.

So I think that making the process run a lot faster and expecting a lot more out of the parties who are opposed to the license is an easy tradeoff for making sure that they have the resources to do it, but I don't think anybody in the room can fail to understand why the party, in the case of Susan, in the case of Jill, who are basically doing this themselves, without the benefit, for the most part, of legal assistance and

1 technical assistance, for them to lay down very stringent rules  
2 that say you've got to do it fast and you've got to do it with  
3 these clear contentions and so forth, is simply intolerable,  
4 and that's kind of the situation.

5 So that's the first point.

6 The second point is that this is reminiscent of the old story  
7 about the farmer who was asked by the preacher, "Do you believe  
8 in Baptism," and he said, "Believe in it? Hell, I've seen it  
9 done." And we already have intervenor funding. The

10 Commission, in its wisdom, amended its rules to provide for  
11 transcripts to be given to parties for free.

12 And if you think that's not a significant amount of funding,  
13 ask the Commission -- I don't know what the dollars are, but I  
14 know transcripts are expensive, unless you guys are breaking  
15 some copyright rules.

16 CHANDLER: That's been long changed.

17 ROISMAN: It has?

18 CHANDLER: For more than ten years.

19 ROISMAN: Changed in what way?

20 CHANDLER: That rule has been suspended.

21 ROISMAN: Oh, it has.

22 CHANDLER: A long time ago.

23 ROISMAN: All right. Well, okay.

24 CAMERON: Let's go on.

25 ROISMAN: But anyway, there was that. Comanche Peak, we had --

1 I talked to George about this -- we had effectively intervenor  
2 funding and it was a result of a negotiated resolution. The  
3 utility wanted to get a decision by a certain date. We said  
4 there were 100 witnesses that we needed to call and put on the  
5 witness stand in order to get their testimony about whether  
6 there had been intimidation of the safety inspectors at the  
7 plant.

8 We and they agreed to do them all by depositions in a two-month  
9 period, seven depositions at a time, provided that we would  
10 then submit the depositions in lieu of testimony and be ready  
11 for proposed findings of fact and conclusions of law by a  
12 certain date.

13 They agreed to it, we did it, and the results were that there  
14 was a rapid resolution. It turned out not to be what the  
15 utility had hoped for, but that's a separate question. The  
16 point was the process worked.

17 Third, about this question of review upon review upon review,  
18 the whole system is review upon review upon review. The only  
19 question is where does it stop. No utility would be willing to  
20 take the lowest member of the staff that they deal with and let  
21 him make all the decisions and they have no right of appeal up  
22 to the next highest person in this chain, up to the hearing  
23 board if they don't like the result, out to the court if they  
24 don't like it.

25 I mean, this is -- review upon review is the way it's done.

If they say no, there can't be a deal.

CAMERON: That harkens back to perhaps using some type of a process like Bob suggested to try to do that.

ROISMAN: Right. And I think the logistics of it, while admittedly are complicated, they are not by any means insolvable. The simplest thing is you set a physical dollar amount per hearing. You say we've got this much money, it will be available, provided that all the intervenors agree that that is to be used by them jointly and they decide how to divvy it up, having to prove, of course, that they used it for appropriate purposes, et cetera.

CAMERON: And just let me put a -- just let me emphasize something so that it's clear. Provision of funding is not just

1 a quid pro quo for certain improvements, other improvements in  
2 the hearing process.

3 They are, as I think people pointed out, there is a  
4 relationship between some of the what I call dysfunctionalities  
5 that occur in the funding that is well prepared issue, and I  
6 didn't want people to think that what you were suggesting in  
7 terms of the tradeoff, that's really -- there is really a link  
8 between some of these things.

9 ROISMAN: Right. Yes. I think that's right.

10 CAMERON: Thanks.

11 ROISMAN: I'm sorry that we've got to go, but --

12 CAMERON: Yes, and I --

13 ROISMAN: I fly infrequently to Manchester, New Hampshire.

14 CAMERON: Right. And I would thank both of you for being here  
15 and a couple people, Mal Murphy suggested, Steve Kohn suggested  
16 that there should at least be another get-together like this  
17 before the proposed draft proposed rule goes out. That was one  
18 suggestion that was made.

19 You heard Bob Backus talk about negotiated rulemaking. So  
20 there's some process suggestions here. I don't know if any of  
21 you other guys -- did we have -- should we adjourn now or do we  
22 have other things that we need to get out on the table here?

23 Tony and Bob are leaving. Susan?

24 HIATT: I just wanted to make a comment about the  
25 dysfunctionalities. My perception is I don't think any



1           intervenor, maybe some rare exceptions, has done anything that  
2           any industry wouldn't do if you were in that intervenor's  
3           shoes.

4           CAMERON: Good point. Ignore my characterization of it. It's  
5           just a shorthand way of trying to describe that.

6           I would just -- Jeff, did you have a quick thing?

7           LUBBERS: Just a quick thing on the intervenor funding. I  
8           don't think anybody was suggesting creating another agency,  
9           although there are models of having an office of public counsel  
10          and public utility commissions and things like that. We're not  
11          even talking about that.

12          We're just talking about increasing public participation  
13          through funding and when Mr. Silberg said that this issue was  
14          settled 20 years ago, it wasn't really settled 20 years ago.  
15          Agencies were in the process of figuring out how to administer  
16          intervenor funding at that point and all of a sudden all these  
17          programs got cut off.

18          Agencies had inherent authority to use intervenor funding and  
19          then Congress starting putting riders on appropriations bills  
20          that blocked these programs.

21          So I don't think the issue was settled. It's just the progress  
22          of these sorts of programs was just sort of cut off in  
23          midstream.

24          CAMERON: Thanks for that clarification. Let's go to see if  
25          George has a comment, and then I just will turn it over to the

1 NRC folks for anything that they want to say before we close.

2 George?

3 EDGAR: I just wanted to weigh in on the intervenor funding  
4 issue. I think the sense of Jay's comment, as I took it, was a  
5 historical comment. The same debates transpired 20 years ago.

6 We've heard the same discussion. Tony and I have been in the  
7 room over the years with the same pros, cons and arguments.  
8 For better or for worse, in my judgment, the NRC has to be the  
9 arbiter here, the notion of private attorneys general, not  
10 accountable in any way to the Executive or the Congress, to me,  
11 is a fundamental policy choice and it's one that thus far has  
12 been made in the negative.

13 There is a GAO opinion that says that the NRC does not have  
14 authority to do this. I think there are many ways of improving  
15 the process to reduce the resource burden, but it's far from  
16 obvious to me that providing intervenor funding does then  
17 result in a more effective or efficient process.  
18 I don't think that you're going to see empirical evidence of  
19 that. I think when you look out there at states where  
20 intervenor funding has been provided and state proceedings,  
21 that there is no evidence that that's resulted in a more  
22 efficient process, a more effective process.

23 I wouldn't assume that merely because you provide funding, that  
24 you've solved six other problems. I don't think that linkage  
25 is there.

1 CAMERON: Thanks, George, for pointing out that there may be  
2 things that can be done to reduce burdens, also.

3 Before I turn it back to Larry and Joe to see if they have any  
4 final comments, I just wanted to thank all of you for being  
5 here and for your contributions on this, and I don't think I've  
6 ever worked with a more impressive group of people, although  
7 sort of a daunting group to work with in some respects.

8 But thank you. Larry, Joe, any final comments?

9 CHANDLER: Just speaking for myself, I wanted to thank all the  
10 other participants for their contribution. I think it  
11 complicates our life, the input, and it makes it easier at the  
12 same time. So thank you very much.

13 GRAY: And I just wanted to say the same, but we will also  
14 carry back to the Commission the substance of what was  
15 discussed around the table here the last day or so.

16 CAMERON: And I guess Jill gets the award for coming the  
17 farthest distance to join us. So an extra thank you for that.

18 All right. We're adjourned.

19 [Whereupon, at 12:03 p.m., the meeting was concluded.]  
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